Reversed and Remanded and Majority and Concurring Opinions filed June 1, 2004.

In The

Fourteenth Court of Appeals

NO. 14-03-01421-CR
NO. 14-03-01423-CR
NO. 14-04-00194-CR

EX PARTE ROBERT DURST, PETITIONER

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause Nos. 01CR1900 & 01CR2007 & 04CR0323

MAJORITY OPINION

Robert Durst appeals three orders, each denying an application for writ of habeas corpus, on the grounds that his bail amounts are excessive and two of his indictments are contradictory and double the bail amount. We reverse and remand.

Appellant was charged in three indictments with the third degree felonies of jumping bail, failing to appear,[1] and tampering with evidence.[2] After bond was set in each case at one billion dollars, appellant filed applications for writs of habeas corpus, challenging the bond amounts. The applications were denied, and appellant's appeals of those decisions have been consolidated in this proceeding.

Appellant's first three issues challenge the bail amounts as violating the constitutional and statutory prohibitions against excessive bail.[3] The right to release before trial is

conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if convicted. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Bail set at an amount higher than reasonably calculated to fulfill this purpose is excessive under the Eighth Amendment. *Id.* Factors relevant to this determination include: the nature of the offense; the accused's ability to make bail; the safety of a victim and the community;[4] and the appellant's work record, family ties, length of residence, prior criminal record, conformity with previous bond conditions, and other outstanding bonds. *Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App. 1981). Bail set at an amount greater than is usually affixed for charges of serious crimes must be supported by evidence in order to protect the constitutional rights of the accused. *See Stack*, 342 U.S. at 6.

In this case, appellant is charged with three non-violent offenses, each of which is punishable by up to ten years imprisonment and a $10,000 fine. *See* TEX. PEN. CODE ANN. §§ 12.34, 37.09(c), 38.10(f) (Vernon 2003). In addition, it is undisputed that appellant's past conduct demonstrates a clear flight risk and that his family possesses tremendous (but unspecified) wealth.

However, the State has not cited, and we have not found, a decision in which bail has ever been set, let alone upheld, at even one percent of any of the three amounts set in this case, regardless of the underlying offense, wealth of the defendant, or any other circumstance.[5] Moreover, in addition to the monetary amounts of bail (and other conditions imposed), each of the bond orders requires appellant to: (1) surrender his passport; (2) not leave Galveston or Harris Counties without prior written court approval; (3) appear weekly in the trial court; and, most importantly, (4) be kept (at his own expense) under twenty-four hour supervision by a licensed peace officer of the State. Considering the unprecedented enormity of the bail amounts and that any flight risk has been abundantly addressed by other bond conditions, we can find no conceivable justification for bail amounts remotely approaching the order of magnitude of those imposed in this case. We therefore conclude that they are unconstitutionally excessive and sustain appellant's first three points of error.

Appellant's fourth point of error contends that the indictments charging two acts of bail jumping are contradictory and, in effect, unlawfully double the amount of bail imposed. However, because this issue was not adequately brought before the trial court, it presents nothing for our review in this appeal, and is overruled. Accordingly, we reverse the orders of the trial court, denying appellant's applications for writ of habeas corpus, and remand the case

for further proceedings.[6]

/s/ Richard H. Edelman
Justice

Judgment rendered and Majority and Concurring Opinions filed June 1, 2004.
Panel consists of Justices Fowler, Edelman, and Seymore. (Fowler, J., concurring).
Publish __ TEX. R. APP. P. 47.2(b).

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[1] *See* TEX. PEN. CODE ANN. § 38.10(a), (f) (Vernon 2003).

[2] *See id.* § 37.09(c), (d)(1).

[3] *See* U.S. CONST. amend. VIII ; TEX. CONST. art. I, § 13; TEX. CODE CRIM. PROC. ANN. art. 1.09 (Vernon 1977).

[4] TEX. CODE CRIM. PROC. ANN. art. 17.15 (Vernon Supp. 2004).

[5] *See Carlisle v. Landon*, 73 S. Ct. 1179, 1182 (1953) («Requirement of bail in an amount that staggers the imagination is obviously a denial of bail. It is the unreasoned denial of bail that the Constitution condemns.»)

[6] We refrain from setting new bond amounts in order to afford the trial court and parties flexibility in determining whether to present further evidence, modify the non-monetary bond conditions, and the like.

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CONCURRING OPINION

I join in every aspect of the majority opinion except one. I write separately because, in my opinion, under the unusual circumstances of this case, we should set a bail amount on each of the three indictments.

As the majority explained, appellant is charged with three third-degree felony offenses; each offense is punishable by a maximum of ten years' confinement and a $10,000 fine. We have already held that a $1 billion bond for each case—and even a $10,000,000 bond for all three—is too much.

When we receive an appeal alleging a bail amount is too high, and we determine the

claim is valid, we typically set an amount. I believe we should and can do that here. Reversing without setting an amount is an inefficient use of everyone's lawyers' and judges' time.

I believe that bond for each indictment should be set between $150,000 and $200,000. That range is higher than what is usually assessed for a third degree felony. In fact, a $150,000 to $200,000 bail is most often reserved for murder[1] and other second- and first-degree felonies.[2] However, two of the third-degree felonies are for fleeing in the face of an indictment charging murder and the third is for destruction of evidence which in this case is a human body. These are serious offenses.

Additionally, appellant has fled before when faced with an indictment. As a result, $150,000 to $200,000 for each offense does not seem too high; it addresses both the seriousness of the offenses and appellant's history of fleeing when faced with legal troubles. And, appellant has acknowledged his ability and willingness to post this amount.

Some might claim that this range which is two hundredth's of a percent of the original bail amount is too low because appellant has fled before. But, the trial court has already addressed this problem by imposing conditions designed to prevent flight. As the majority states, each bond requires appellant to do the following: (1) surrender his passport; (2) not leave Galveston or Harris Counties without prior written court approval; and (3) appear weekly in the trial court. In addition to these three conditions, the judge imposed one other, more important condition: appellant must pay for twenty-four hour supervision by a licensed peace officer of the State of Texas chosen by the trial judge. With these precautions, the judge has done all she can to ensure that appellant does not flee.

In short, the original bail amount of $1,000,000,000 is too high. I would reverse that part of the judgment setting bail and set a new bond amount for each alleged offense between $150,000 and $200,000. I would affirm the portion of the judgment imposing conditions on each bond.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Majority and Concurring Opinions filed June 1, 2004.

Panel consists of Justices Fowler, Edelman, and Seymore. (Edelman, J., majority).

Publish __ TEX. R. APP. P. 47.2(b).

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[1] *See, e.g.*, *Ex parte Garza*, No. 04-02-00803-CR, 2003 WL 21750013 (Tex. App.__San Antonio July 30, 2003, no pet.) (not designated for publication); *Ex parte Green*, 940 S.W.2d 799 (Tex. App.__El Paso 1997, no pet.); *Ex parte Prelow*, 929 S.W.2d 54 (Tex. App.__San Antonio 1996, no pet.).

[2] *See, e.g.*, *Hernandez v. State*, No. 07-03-0094-CR, 2003 WL 21998057 (Tex. App.__Amarillo Aug. 22, 2003, no pet.) (not designated for publication) (possession of over 400 grams of cocaine); *Ex parte Huff*, No. 14-02-01069-CR, 2003 WL 1344843 (Tex. App.__Houston [14th Dist.] Mar. 20, 2003, no pet.) (not designated for publication) (possession with intent to deliver at least 400 grams of cocaine); *Ex parte Gomez*, No. 04-02-00431-CR, 2003 WL 292175 (Tex. App.__San Antonio Feb. 12, 2003, no pet.) (not designated for publication) (child abandonment or endangerment, arson, and assault on a family member); *Ex parte Leonides*, No. 03-01-00641-CR, 2002 WL 189057 (Tex. App.__Austin Feb. 7, 2002, no pet.) (not designated for publication) (intoxication manslaughter).